83-944

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

REUBEN MICHAEL PIERI

Petitioner/Applicant

VS.

SOUTH CENTRAL BELL TELEPHONE COMPANY

Defendant/Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NATHAN GREENBERG
Greenberg & Dallam
848 Second Street
P.O. Box 365
Gretna, Louisiana 70054
366-6491

ATTORNEY FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

Whether the Circuit Court of Appeals can reverse a jury verdict in favor of a plaintiff where the appellate court simply disagrees with the finding of negligence by the jury. When a jury hears various theories of liability advanced and based on evidence in the record, should an appellate court disturb the jury's finding?

The instant case represents the first known case of negligent tracing of purported harassing or obscene phone calls by a telephone company to the residence of a person subsequently arrested and charged with making harassing or obscene phone calls where that person did not make the phone calls allegedly attributed to him. This is the first instance in which a telephone company has been accused of negligence, and found liable for such negligence in the tracing of phone calls resulting in a wrongful arrest and a suit for damages based upon the negligence of the telephone company in question.

PARTIES TO THE PROCEEDING

1. Reuben Michael Pieri, a resident of Gretna, Louisiana.

2. South Central Bell Telephone Company, a foreign corporation qualified to do and doing business in the State of Louisiana.

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The application of Reuben Michael Pieri, plaintiff-appellee, now applicant for a writ of certiorari, with respect represents:

PUBLICATION OF OPINION

The opinion delivered by the Honorable U. S. Court of Appeals, Fifth Circuit, is not reported in any official or unofficial reports. A copy of that opinion is annexed hereto and made a part hereof and is identified as Appendix A. We are at a loss to understand why the Hon. Court of Appeals for the Fifth Circuit specifically ordered that this opinion not be printed.

The panel which decided this case determined that publication of the opinion was neither required nor justified; and this conclusion troubles us indeed. Although there are several cases at the State Supreme Court level reported in the criminal law area as to number tracing, there is only one prior reported decision in the civil law area; namely, *Long v. Southern Bell Tel. & Tel. Co.*, 280 S.E. 2d 3 (N.C. 1981) in which a motion for summary judgment was maintained, and the case never did reach the jury. Thus, Pieri's case represents the first reported instance of a civil matter reaching the jury and we feel that the case is of such paramount importance that the opinion warrants publication, whether we are successful or not. We believe that it is extremely important that lawyers and litigants throughout the country are made aware of the fact that the allegedly perfect tracing procedures of the Bell system are not nearly as perfect as has been represented; that prompt action on the part of an innocent accused person can result in vindication as well as an action against Bell for its negligence; and that an innocent accused may well be justified in having an independent utilities expert examine his line to ascertain where the error occurred in the tracing to his number. We must respectfully call the Court's attention to the fact that the knowledge gained by the opponennts of the telephone company should become public knowledge and that it should not be suppressed by failing to publish this decision.

JURISDICTION

(1) The decree rendered by the Honorable U.S. Court of Appeals, Fifth Circuit, was dated July 27, 1983; thereafter, application for re-hearing was timely filed and resulted in a denial of the re-hearing on September 12, 1983.

(2) This Honorable Court has jurisdiction to review the decree in question by writ of certiorari pursuant to the provisions of 28 U.S. Code, §2101(c).

CONSTITUTIONAL PROVISIONS RELIED UPON

Amendment VII, U.S. Constitution, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

CONCISE STATEMENT OF THE CASE

On or about January 12, 13, 14 and 15, 1979, Mr. and Mrs. Thomas Turner of 841 Legion Street of Gretna, were receiving harassing and obscene telephone calls at their telephone number 393-8597. They reported the incidents to both the telephone company and to the office of the Sheriff of the Parish of Jefferson and ultimately a number trap system was placed upon their line. On January 12, 13, 14 and 15, 1979, South Central Bell Telephone Company traced the harassing and obscene telephone calls to 394-9608, the number of one Reuben Michael Pieri, who resided at 2116 Guardian Street, or a distance of about three blocks from Turner. A period of approximately two (2) months elapsed following which Mr. Turner complained to Sheriff Cronvich of Jefferson Parish who in turn contacted Deputy Frank Dedo Hardin which subsequently resulted in the arrest of the plaintiff, Reuben Michael Pieri. Annexed hereto is a copy of the exhibit designated as "Court-1" which contains a detailed listing of the dates and times the calls were

traced to the Pieri phone number.

The first knowledge that Mr. Pieri had about the incident came from information given to him by his wife on or about March 14, 1979, at which time Deputy Hardin called at the Pieri residence at 2116 Guardian Street in Gretna. At that time, Mrs. Pieri requested that Deputy Hardin return the following day so that he could discuss the matter with the plaintiff, Reuben Michael Pieri.

On the next afternoon, Deputy Hardin again appeared at the Pieri residence, was met at the door by Mr. Pieri and subsequently discussed the matter of the allegedly harassing and obscene phone calls. The complaint to Deputy Hardin indicated that a male voice was making the harassing and obscene phone calls, and Mr. Pieri then indicated that the only persons in the home were himself, his wife, and his two children, the latter of whom were a girl, age 8 and a little boy, age 5. Further discussion indicated that Mr. Pieri was the only person at the Pieri residence who could have been guilty of the harassing and obscene phone calls and Deputy Hardin then placed him under arrest. Mr. Pieri was then taken to the Jefferson Parish Lock-Up where he was booked on 12 counts of harassing and obscene phone calls during the days of January 13 and 14, 1979. Thereafter, Mr. Pieri retained counsel to defend him in the criminal action, pleaded not guilty therein, and proceeded to attempt to vindicate himself from the accusation.

With great difficulty, Mr. Pieri was able to eventually trace his movements on January 12, 13 and 14, 1979. Admittedly there are certain blank spaces in the tracing of his movements; however, Mr. Pieri ascertained that on Friday night, January 12, 1979, he was present together with his wife at the St. Anthony's Church Las Vegas Night in

Gretna, where he and his wife acted as operators for some of the games; that he was at the St. Anthony's event from about 7:00 to 12:00 p.m., and that some of the offending calls were made from a number traced to his telephone number on that evening. The following day Mr. Pieri was able to trace his movements to a photography shop where he, his wife and children had an appointment with a photographer, Mr. William Shores, who testified relative to the appointment at 11:00 a.m. Thereafter, Mr. Pieri and his family went to lunch at a restaurant in the French Quarter and subsequently visited an art gallery known as "Carolyn Summers' Gallery" where his little daughter signed the register that day. Copy of that register has been produced in evidence and marked "P-5". Several of the offending calls were made during the period of time that everyone was absent from the Pieri residence that day.

On the evening of Saturday, January 13, 1979, both Mr. and Mrs. Pieri baby sat at their home for a relation who brought two of their children to the residence. These persons testified as to their being present in the Pieri household between 8:20 and 8:40 p.m., during which time several of the offending phone calls were recorded by South Central Bell Telephone Company from the Pieri's telephone number, 394-9608.

The Pieris were unable to produce any evidence to show any alibi for any portion of Sunday, January 14, 1979.

The plaintiff contended that he was innocent of the accusation, that he was not the party who made the offending, harassing or obscene phone calls, and that he subsequently was able to get the District Attorney for the Parish of Jefferson to dismiss the criminal charges pending against him based upon adequate proof as to alibi. While

the criminal charges were pending, Mr. Pieri filed an injunction proceeding to have the telephone lines and and pedestals from his residence to the Aurora Central Office examined by an expert with Southwest Utilities for the purpose of seeking to ascertain whether he could find any reason or reasons for the improper tracing of the call to the Pieri telephone number. Following the dismissal of the criminal charges against him, Mr. Pieri supplemented and amended the suit in the state court and added thereto a claim for damages, following which the damages aspect of the matter was removed to the United States District Court for the Eastern District of Louisiana. The trial of the case subsequently occurred on February 8, 9 and 10, 1982 and resulted in a jury verdict in favor of plaintiff in the sum of $47,500.00.

Following the filing of the usual post trial motions and the denial thereof, the defendant then appealed to the U.S. Court of Appeals, Fifth Circuit, which reversed the jury verdict by decree of July 27, 1983. Application for rehearing was timely filed which was denied on September 12, 1983. We have now filed this application for a writ of certiorari or review.

REASONS FOR ALLOWANCE OF WRIT

Plaintiff readily acknowledged that he has a case based upon circumstantial evidence. Plaintiff contends that he showed evidence of the negligence of the defendant in the following particulars:

(1) That petitioner presented evidence of an alibi for most of the time during which he was alleged to have made the harassing and obscene calls traced to his telephone number by Bell; and

(2) That no other person in the house could have made the allegedly harassing and obscene phone calls traced to his number but him; and

(3) That Deputy Hardin, the Jefferson Parish Sheriff's Deputy who arrested petitioner would not have arrested petitioner *but for* the telephone company records; and

(4) The switching equipment technician of Bell on duty in its Aurora Central Office stated that he could not say that he followed the procedure of checking the line link from the calling number, placing it in a machine called the matchbox, and then having the machine furnish the number of the calling phone on each and every card; and

(5) The switching equipment technician acknowledged that one effect of multiple jumpers is "dual service," i.e., one telephone number working in two different houses; and

(6) A repair technician employed by Bell stated that when he examined Pieri's line in August of 1979, he found the phone to have no dial tone and that there was a broken cable therein; and

(7) A left-in connection from either an off premises extension may result in "free dial tone"; and

(8) A CT in an apartment building left by an installer or repair technician can result in a left-in connection not being properly recorded at the telephone company central office; and

(9) Transposition or improper change in cable assignments occurs frequently and means that telephone

communications to a given number are traveling over cable which they are not supposed to travel over; and

(10) William Sarver, a Bell staff manager, testified with reference to a buried cable problem requiring repair in the immediate area of a pedestal which serviced Pieri's line. He stated that the problem was generated by water in the cable requiring repair about the same time the Pieri incident occurred.

(11) Exhibit P-12 indicates there was repair work on the cable for Pieri's phone at the intersection of Legion and Guardian Streets where Crescent Construction Company had dug for telephone line repairs during the period from January 1979 through March 1979, or a period of six weeks or more.

When plaintiff sought to show the existence of the hole through Thomas Osgood, a witness, an objection to relevancy was sustained. Thus the jury did not even have the benefit of what Osgood actually saw on that date

The defendant contended in its argument to the jury that its machinery was perfect and did not make mistakes. The defendant contended that its trapping machinery could not have traced to an incorrect telephone number. Plaintiff presented much evidence to show many things that could have happened which resulted in the erroneous tracing to plaintiff's telephone number. These varying theories of negligence were reviewed by the jury and eventually accepted, rendering the defendant liable.

Immediately after the alleged incidents of January 12, 13, 14 and 15, 1979, there was repair work being performed on the telephone cable in Pieri's residence area.

Plaintiff had no other way to prove his case besides circumstantial evidence because plaintiff did not even know of the accusations against him for more than two (2) months after the alleged tracings to his home phone number had occurred. Under the circumstances, the most that plaintiff could ever adduce herein was circumstantial evidence which plaintiff did and which resulted in the jury accepting the evidence and the theory of liability advanced for the plaintiff. It is clear that the use of circumstantial evidence is sufficient to prove negligence. As was stated by the Louisiana Supreme Court in *Vonner v. State Department of Public Welfare*, 273 So.2d 252 (La. 1973):

> "To meet the burden of proof required in civil cases, the circumstantial evidence need not negate all other *possible* causes; Naquin v. Market Cas. Co. 244 La. 569, 153 So.2d 395 (1963), and need only prove the casual relationship to be more probable than not, Weber v. Fidelity and Cas. Ins. Co., 259 La. 599 (250 So.2d 754 (1971). 273 So.2d at 255 (Emphasis in original).

In other words, plaintiff submits that the causation element of the negligence formula was rightly inferred by the jury from the circumstantial evidence which led to the arrest of Pieri. It is clear that *but for* the faulty identification of Pieri's telephone number, his arrest would not have occurred. The circumstantial evidence dictates that the defendant was a substantial factor in bringing about the harm to Pieri, rendering the defendant liable in this matter. The attempt by the Court of Appeals, Fifth Circuit to review the issue of negligence is a substitution of the jury's finding of fact in favor of the plaintiff because the court panel simply did not agree with the finding by the jury. Such a basis of distinction is an improper basis of reversal,

considering the case of *Basham v. Pennsylvania Railroad Company*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed. (2d) 80 (1963), wherein the defendant argued that it was impossible for the accident to have happened as the plaintiff stated, and *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), wherein the argument by defendant of alleged physical impossibility as to the accident having occurred in the manner suggested by the plaintiff was rejected and the jury's verdict was reinstated.

The result reached in the decree dated July 27, 1983, is contrary to two express holdings of the U.S. Supreme Court. The two decisions deal with a jury's function in deciding factual issues when faced with conflicting theories of liability. In both *Lavender v. Kurn, supra*, and *Basham v. Pennsylvania Railroad Company, supra*, the verdict of the jury was reinstated by the Supreme Court as the court specifically found that the reversal of the jury's verdict by the appellate courts invaded the function of the jury as the trier of fact.

Lavender v. Kurn, supra, involved a situation wherein an action was brought for the death of a railroad worker under the Federal Employers' Liability Act. The theory of liability expounded by the plaintiff in this matter was difficult to prove as there were no eye witnesses to the decedent's death. The facts were straightforward: Haney (decedent) had been struck in the back of the head while on the job at the railroad yard. His head had a two-inch gash, his hat also had a distinguishing mark which indicated that Haney's skull had been fractured by "some fast moving small round object". The plaintiff's theory of how the accident occurred involved the idea that possibly the object which struck Haney was the curled end of a nail hook hanging from the train, calling the liability of the defendant into

play. The defendant took the position that Haney had been murdered. Further, and more importantly, the defendant introduced evidence which showed that it was physically and mathematically impossible for the hook to strike Haney. This was done by showing through analysis of Haney's height, the height of the hook hanging from the railroad car and the position of Haney's body, that the plaintiff's theory that the hook struck Haney was physically impossible. In spite of this evidence presented by defendant, the jury believed the plaintiff's theory. The Supreme Court saw fit to reinstate the jury verdict, as there was a "reasonable basis in the record for inferring that the hook struck Haney" 66 S.Ct. at 744.

The Supreme Court held the defendant liable in spite of the defendant's argument of alleged physical impossibility. The argument of physical impossibility is analogous to the argument advanced by South Central Bell in its presentation to the jury. South Central Bell claimed that its machinery was perfect and that the theory of liability alleged by Pieri was physically impossible, as its machinery did not make mistakes. The jury analyzed the various theories put forth by the plaintiff and determined that any one of a number of things could have happened through the negligence of South Central Bell which led to the faulty identification of Pieri. More specifically, the plaintiff advanced the theory that Mr. Palmisano had not followed the proper procedure in the trace and his own testimony corroborated the fact that he did not remember whether he had followed standard operating procedure in this specific instance. After reviewing these facts, the jury chose to believe the theory set forth by the plaintiff of a negligent act and/or omission by the defendant in following the tap procedures. There was ample evidence in the record for the jury to conclude that the defendant had been

negligent in this case. The factual dispute was resolved by the jury in favor of the plaintiff. As was stated in the *Lavender* decision:

> "...It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 66 S.Ct. at 744.

As in *Lavender*, that the appeal court may disagree with the decision of the jury is immaterial. A review of the record shows that a number of theories were advanced by the plaintiff which were supported by evidence which can be reviewed in the record. The defendant advanced the theory of physical impossibility. The jury accepted the theory advanced by Pieri in finding of liability of the defendant and the ultimate award by the jury should be allowed to stand.

Basham v. Pennsylvania Railroad Company, supra, involved another situation wherein an employee of the railroads brought an action for personal injuries under the Federal Employers' Liability Act. The jury returned a

verdict for the plaintiff which was subsequently set aside by the Trial Judge. The Appellate Division and Court of Appeals of the State of New York affirmed without opinion. The Supreme Court reversed, reinstating the jury verdict.

At the trial of this matter, petitioner showed that at the time of the accident, he was working on a hoist platform located in a work pit underneath a railroad car on which new wheels were being installed. As he moved a hundred pound spring, he alleged that the platform moved causing him to drop the spring on his finger. The finger eventually had to be amputated. The fact that the platform moved was alleged to be the cause of the accident. The defendant introduced evidence which showed that it was physically impossible for the accident to have happened in the manner claimed by petitioner, as the defendant claimed that the platform was virtually immovable. The Supreme Court discussed the conflict in the testimony and held that the conflict should be resolved as the jury had resolved it.

The latter situation is also analogous to the case at bar. The jury has heard conflicting theories as to how the faulty identification of the defendant was made. The jury has determined that the plaintiff's theory showed South Central Bell to be negligent and as the jury has spoken, the factual determination should not be disturbed.

Although both the *Lavendar* and *Basham* cases arise in the context of the Federal Employers' Liability Act, there is authority to the effect that the standard of review applicable in those type of negligence actions is not confined to FELA and Jones Act litigation. As was stated in *Yozzie v. Sullivert*, 561 F.2d 183 (10th Cir. 1977):

"Charles Alan Wright in his Law of Federal Courts has cited a series of Supreme Court decisions reversing judgments of lower courts which have taken away from the jury cases arising under Federal Employers' Liability and Jones Acts. The Supreme Court has held that so long as there is evidence from which an inference might rationally be drawn as to how the accident happened or whether defendant's conduct was negligent, it is for the jury, to accept or reject the inference even though it may be improbable and even though some conflicting inference is highly probable. Citing Lavender v. Kurn, 327 U.S. 645, 652-53, 66 S.Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P.U.R. Company, 1944, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520; Rogers v. Missouri Pacific Railroad Company, 1957, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493. *Wright says that these holdings are not confined to FELA and Jones Act litigation since the cases refer to the jury's historic functioon and to the Seventh Amendment.* Also, the Supreme Court has cited these cases as representing the "federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." Citing Dick v. New York Life Insurance Company, 1959, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935; Continental Ore Co. v. Union Carbide & Carbon Corp., 1962, 370 U.S. 690, 696 n. 6, 82 S.Ct. 1404, 8 L.Ed.2d 777. 561 F.2d at 188 (Emphasis added)

We respectfully submit that the result reached in the decree dated July 27, 1983, by the Honorable U.S. Court of Appeals, Fifth Circuit, is contrary to the two express holdings of the U.S. Supreme Court. The Court of Appeals *simply cannot* substitute its findings for the findings of fact by the jury consistent with the decisions cited above.

The Honorable Court of Appeals, Fifth Circuit, seeks to avoid the conclusion that the Court is substituting its conclusions for the findings of the jury by holding that the motion for the judgment notwithstanding the verdict should have been granted because plaintiff allegedly produced no evidence of negligence of the defendant. However, plaintiff introduced much evidence and varying theories of liability which the jury had the opportunity to analyze and accepted as its findings. The theory of the case advanced by the defendant simply contended that its tracing machinery was perfect, that it made no mistakes in tracing, and that it was impossible for the issue of liability to have been decided faborably to the plaintiff. That approach to reversal of the jury verdict in the cited cases of *Basham v. Pennsylvania Railroad Company* and *Lavender v. Kurn, supra*, was exactly the basis found to be improper by the Honorable U.S. Supreme Court in those decisions; and we do not believe that the Honorable Court of Appeals, Fifth Circuit, can circumvent the rule of *Lavender* and its progeny by approaching this case by finding error in the failure of the Trial Judge to grant the motion for judgment notwithstanding the verdict. The basis of reversal by the Circuit Court of Appeals in both *Basham* and *Lavender* was premised upon impossibility of a finding of the defendant therein, i.e., it just could not have happened that way. The Honorable Court of Appeals, Fifth Circuit, reaches exactly the same result herein by holding that the motion for judgment notwithstanding the verdict should have been granted by the Trial Court.

The Fifth Circuit Court of Appeals relied upon the decision of *Boeing Co. v. Shipman*, 411 F.2d 365, 374, 375 (5th Cir. 1969) which states:

"...if there is substantial evidence opposed to the

motions, that is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, in the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. Motions for a directed verdict and judgment N.O.V. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict and substantial evidence to create a jury question. However, it is the function of the jury, as the traditional finder of facts, and not the Court, to lay conflicting evidence and inferences, and determine the credibility of the witnesses."

Thus, the Honorable U.S. Court of Appeals, Fifth Circuit, holds that there was no evidence of negligence of Bell, cites as its authority *Boeing Co. v. Shipman, supra,* and totally disregards the rationale of that decision. We do not believe that we have reached the point where appellate review in the federal court system permits a substitution of factual review on appeal for the factual findings of the jury. Nonetheless, this is what the appellate court has done in this case disregarding the evidence presented and the theory of liability advanced by the plaintiff. Then the panel goes further and orders that its opinion not be printed. Why?

CONCLUSION

We believe that we have here a case of first impression of significance to persons throughout the nation. We believe that lawyers and lay persons alike should be aware of the imperfections of the telephone number tracing

system of the Bell Telephone network, and we further respectfully submit that the finding of negligence and ultimate liability as to South Central Bell Telephone Co. by the jury should be reinstated by this Honorable Court.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari directed to the Honorable Judges of the United States Court of Appeals, Fifth Circuit, commanding them to send to this Court the necessary certified copies of the proceedings entitled "Reuben Michael Pieri v. South Central Bell Telephone Company," No. 82-3264 on the docket of said Court and lately pending therein, to the end that their validity may be ascertained, and that after due proceedings, a writ of certiorari issue herein, that the matter be reviewed, and that the judgment of July 27, 1983 herein reversing the jury verdict of February 10, 1982, in favor of plaintiff in the sum of $47,500.00 be set aside and that the said jury verdict be reinstated, in accordance with law.

Petitioner further prays for all necessary writs, orders and decrees in the premises and for all general and equitable relief, and for all costs.

Respectfully submitted,

GREENBERG & DALLAM
848 Second Street
P.O. Box 365
Gretna, Louisiana 70054
366-6491

BY: _____
NATHAN GREENBERG
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition for writ of certiorari or review on behalf of plaintiff has been mailed to Raymond J. Salassi, Jr. of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Attorneys at Law, 225 Baronne, New Orleans, Louisiana 70112, by postage prepaid.

NATHAN GREENBERG

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130

July 27, 1983

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 82-3264

Reubin Michael Pieri
vs
South Central Bell Telephone Co.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P. and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 41 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal* appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly

demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, this Court's plan under the Criminal Justice Act provides that in the event of affirmance or other decision adverse to the party represented, appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court and shall file such petition if requested to do so in writing by such party. Vouchers claiming compensation and reimbursement of expenses should be filed as promptly as possible and *in no event later than 60 days* after representation is completed.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: _____
Deputy Clerk

/ka
Enclosure

Mr. Raymond J. Salassi, Jr.
Mr. Nathan Greenberg

IN THE UNTIED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3264

REUBIN MICHAEL PIERI,

Plaintiff-Appellee,

versus

SOUTH CENTRAL BELL TELEPHONE CO.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 27, 1983)

Before CLARK, Chief Judge, THORNBERRY and RANDALL, Circuit Judges.

THORNBERRY, Circuit Judge:

INTRODUCTION:

South Central Bell Telephone Company (Bell) appeals the district court's denial of its motion for judgment notwithstanding the verdict. Concluding that plaintiff Ruben Michael Pieri (Pieri) failed to prove a specific negligent act by Bell, we REVERSE the court's denial of Bell's motion j.n.o.v.

FACTS AND PROCEDURAL HISTORY:

On January 11, 1979, Mr. and Mrs. Thomas T. Turner of Gretna, Louisiana complained to Bell's Annoyance Call Bureau that they were receiving obscene and harassing telephone calls at their home.[1] In compliance with its normal procedures for handling these complaints, Bell advised the Turners that before any further action could be taken, a formal complaint had to be filed with the Jefferson Parish Sheriff's Office. The Turners filed the required complaint, and upon receiving written authorization from the Turners, Bell installed a trap on their line on January 12, 1979.

In its trapping operations, Bell employs number-grouping equipment, trouble-recording equipment, and a translator to identify the source of all telephone calls to a given number. This equipment is routinely used to detect trouble and service problems on a customer's line. The trapping procedure causes all incoming calls on a given line to activate receiving equipment in the central office which punches out a "trouble card" identifying the date, time and telephone number of the incoming call.

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[1] Bell is a public utility regulated by the Louisiana Public Service Commission. All its operations in furnishing services to its subscribers are governed by the General Subscriber Services Tariff (GSST) on file with the Commission, and by regulations and orders issued by the Commission. Subsection A2.2.10 (a)(7) of the GSST prohibits obscene or harassing phone calls, providing that a subscriber's service may be suspended or terminated without notice upon "use of service or facilities for a call or calls, anonymous or otherwise, if in a manner reasonably to be expected to frighten, abuse, torment or harass another." General Subscriber Services Tariff, A2.2.10(a)(7) (February 22, 1972).

By General Order dated May 17, 1956, the Commission required that all telephone companies coming within its jurisdiction take all possible steps to apprehend persons making obscene or harassing phone calls, when their cooperation is requested by law enforcement officers.

The Turners were instructed to call a given number at the central office whenever they received an obscene or harassing call. Their call would be answered by a technician who was monitoring the trap equipment. His job was to set aside the trouble card identifying the call most recently made to their home.

Between January 12 and 15, 1979, the Bell technician set aside over 30 trouble cards in response to calls from the Turners. Each of these cards identified the calling number as 394-9608. This number was registered to Pieri, appellee in this case.

Bell subsequently turned these cards over to the Jefferson County Sheriff's Office. Two months elapsed, during which the Sheriff's Office took no action. Mr. Turner then wrote the Sheriff a letter requesting that he act on the complaint.

Although Mr. and Mrs. Turner later indicated that they believed the caller to be a girl or a teen-age boy, and suspected a former boyfriend of their daughter, the complaint given the Sheriff's Office indicated only that the caller was "male." Armed with this complaint and Bell's trouble cards, a sheriff's deputy then went out to the Pieri residence. Pieri was not at home, and his wife asked the deputy to return the following day. The next day, the deputy paid another visit to the Pieris, and after determining that Pieri was the only male on the premises who could have made the calls, arrested him.[2] Pieri was taken down to the station, processed, and charged with twelve counts of making harassing and obscene phone calls.

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[2] The only other male on the premises was Pieri's five-year-old son.

After considerable effort, Pieri was able to establish that he was not at home at many of the times at which the offending calls were made. The Jefferson Parish District Attorney subsequently dismissed the charges against him based upon adequate proof as to alibi. Before the charges were dismissed, Pieri obtained a temporary restraining order against Bell enjoining that compnay from tampering with the pedestals or central switching equipment relative to Pieri's line, or from attempting to correct any defect in this equipment, until Pieri had the opportunity to inspect the pedestals, lines, and other equipment for defects or flaws. This inspection was carried out in August 1979 by an expert hired by Pieri for this purpose.

Pieri supplemented and amended the TRO in state court with a claim for damages resulting from Bell's negligence in identifying his number as that of the offending caller. Bell removed the suit to federal court, and a jury awarded Pieri $47,500 in damages. The district court denied Bell's motion j.n.o.v. This appeal followed.

ANALYSIS:

In this Circuit we are guided in our review of a denial of a motion j.n.o.v. by the standard set out in Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). Under *Boeing,* we must consider all the evidence in the light most favorable to the party opposed to the motion. A mere scintilla of evidence is insufficient to present a question for a jury, however, if there is *substantial evidence* opposed to the motion, that is, evidence of such quality and weight that reasonable men in the exercise of impartial judgment might reach different conclusions, then the jury verdict must be allowed to stand.

Pieri claimed at trial that Bell's negligence in identifying his line as the one used to harass the Turners was a cause-in-fact of his arrest, humiliation, and attendant mental anguish. Louisiana law employs the familiar duty/risk theory in negligent cases.

> In order for a plaintiff to be successful in [an action for negligence], he must prove by a preponderance of the evidence, that defendant's conduct was a cause-in-fact of the accident; that there was a duty imposed upon defendant under the circumstances of the case; that the risk of the particular injury which plaintiff suffered was within the scope of the protection of that duty; that the defendant breached that duty; and that such breach of duty requires a response in damages.

State Farm Mutual Insurance Co. v. South Central Bell Telephone Co., 343 So.2d 758, 759 (La. Ct. App. 1977). Under this scheme, a plaintiff must first prove by a preponderance of the evidence that some conduct by defendant was a cause-in-fact of the harm suffered.

> The plaintiff must bear the burden of proving both the existence of the injuries of which he complains and the causal connection between them and the accident for which the defendants are liable. He must establish his claims to a legal certainty by a reasonable preponderance of the evidence, and mere possibility, even unsupported probability, are not sufficient in themselves to support a judgment in his favor.

Livaccari v. United Jewish Appeal, Inc., 126 So.2d 67, 70 (La. Ct. App. 1960). *See also* Transportation Mutual Insurance Co. v. Southern Scrap Metal Co., 181 La. 1028, 160

So. 800, 802 (La. 1935) ("It is well settled that: 'To recover damages for injuries sustained through the alleged fault of another, the fault, and the connection between the fault and the injuries, must be shown, *with reasonable certainty*. There can be no recovery where *only the possibility, or the probability*, of such fault and connection is shown.' " (Emphasis in original)).

Careful review of the record convinces us that Pieri never presented any evidence of any act or omission committed by Bell which could have resulted in the misidentification of his telephone line. Indeed, Pieri admits as much in his brief, where he says: "Although plaintiff was unable to ascertain the exact basis of the erroneous tracing of the harassing or obscene phone calls to plaintiff's telephone number, plaintiff was able to show that any number of things could have occurred to have generated the erroneous tracing to his number."[3] it is not enough to show that "any number of things could have occurred." Negligence cannot be proved without proof of some negligent conduct by the defendant.[5] Pieri's expert examined Pieri's line, the pedestals that served it, and the corresponding central switching equipment without discovering anything amiss. All of the experts who testified on the subject stated that if any of the things claimed to

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[3] We note that although Pieri assumes that the offending calls were not placed from his phone, the evidence adduced at trial does not conclusively establish that someone else did not enter his home and use his phone during his absence. However, since Pieri proved no negligent act by Bell, we need not reach this issue here.

[4] Pieri also states in his brief that no attempt was made at trial to invoke the evidentiary rule of *res ipsa loquitur*.

[5] The district court properly charged the jury that "the mere fact that the incident occurred, standing alone, does not permit the jury to draw the inference that it was caused by anyone's negligence."

have gone wrong had in fact occurred, inspection of the lines and equipment would have revealed physical evidence of some defect.[6]

The only "evidence" of an error on Bell's part was testimony by a Bell technician that he had no independent recollection of having checked the main distributor frame (MDF) for multiple jumpers when trapping the Turners' calls over three years earlier.[7] However, this same technician did testify that it was his practice to double-check and even triple-check for jumpers, and that he was almost positive that he did so when trapping the Turner's line. This technician's inability to remember with absolute certainty whether he had followed all his normal procedures in a specific instance occurring over three years earlier does not alone support the inference that an error was made, especially where subsequent independent inspection of the equipment would have revealed any defect that might have existed.

In short, our review of the record fails to reveal that conflict in substantial evidence which must exist for a judgment to withstand a motion j.n.o.v. *Boeing v. Shipman.* Accordingly, we REVERSE the district court's denial of Bell's motion for judgment notwithstanding the verdict.

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[6] Pieri does not claim that Bell violated the TRO against tampering with or repairing the equipment, and, in any event, there is no evidence to support such a claim. Although Pieri's expert did not conduct his inspection until August 1979, there is no evidence that this delay was in any way the fault of Bell.

[7] The record contains conflicting testimony as to whether the presence of multiple jumpers on the MDF could result in line misidentification. The trapping technician's supervisor testified that such a condition would not affect the accuracy of the trouble cards. He also stated that because of the large number of trouble cards generated by the trap on the Turner's line, he had personally performed a series of tests on the trap to verify the accuracy of the data produced.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130

NOTICE

The panel deciding the case has determined that publication of this opinion is neither required nor justified under the criteria for publication set out in Local rule 47.5

Loc.R. 47.5. PUBLICATION OF OPINIONS

47.5.1 *Criteria for Publication.* The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion will be published if it;

—:establishes a new rule of law, alters or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

—:applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

—:explains, criticizes, or reviews the history of existing decisional or enacted law;

—:creates or resolves a conflict of authority either within the circuit or between this circuit and another;

—:concerns or discusses a factual or legal issue of significant public interest;

—:is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may be published if it:

—:is accompanied by a concurring or dissenting opinion;

—:reverses the decision below or affirms it upon different grounds.

47.5.2 *Publication Decision.* An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. The panel shall reconsider its decision not to publish an opinion upon the request of any judge of the court or any party to the case. The opinion shall then be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason.

47.5.3 *Unpublished Opinions.* Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an unpublished opinion is cited, a copy shall be attached

to each copy of the brief.

FIFTH CIRCUIT STATEMENT ON PETITIONS FOR REHEARING OR REHEARING EN BANC

NECESSITY FOR FILING

It is not necessary to file a petition for rehearing in the Court of Appeals as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

PETITION FOR PANEL REHEARING

A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is *not* to be used for reargument of the issue previously presented or to attack the court's well settled summary calendar procedures. Petitions for rehearing are reviewed by panel members only. Four copies of all petitions for rehearing shall be filed.

EXTRAORDINARY NATURE OF SUGGESTIONS FOR REHEARING EN BANC

A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for *panel rehearing* but not for rehearing en banc.

THE MOST ABUSED PREROGATIVE

Suggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. While such suggestions were filed in 13% of the cases decided by this circuit last year, less than 1% of the cases decided by the court are reheard en banc; and most of the rehearings granted resulted from a request for en banc consideration by a judge of the court initiated independent of any suggestion.

PETITION FOR REHEARING EN BANC

The form, contents and number of copies of the suggestion are set out in Local Rule 35 copied on reverse side.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3264

REUBIN MICHAEL PIERI,

Plaintiff-Appellee,

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(September 12, 1983)

Before CLARK, Chief Judge, THORNBERRY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

Count 1 ITR + LVM HOLES IN ALL CHROS C.A. 80-483 Sec "C"

DATE	TIME	CALLED PARTY #	CALLING LINE	LIN
1-12-79	2014	393-8597	00-00-62	(394-9608)
	2014			
	2015			
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	2029			
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1-13-79	1738	393-8597	00-00-62	(394-9608)
	1739			
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1-14-79	1316	393-8597	00-00-62	(394-9608)
	1342			
1-15-79	2054	393-8597	00-00-62	(394-9608)
	2055			